(5)

No. 98-470

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RUHRGAS, A.G.,
Petitioner,
v.
MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
AND MARATHON PETROLEUM NORGE A/S,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

In a case properly filed in state court and removed by the defendant to federal court, may a district court ignore a challenge to federal subject matter jurisdiction, conduct discovery, and enter an order of dismissal without first ruling on a motion to remand for lack of subject matter jurisdiction?

RULE 29.6 DISCLOSURE

Marathon Oil Company is a subsidiary of USX Corp. Marathon International Oil Company is wholly-owned by Marathon Oil Company. Marathon Petroleum Norge A/S is a Norwegian corporation whose stock is held by a wholly-owned affiliate of Marathon International Oil Company.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. Factual Background

On July 6, 1995, Respondents Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge ("Norge") filed this case in Texas state court, alleging conspiracy, fraud, and participation in a breach of fiduciary duty. Marathon and MIOC alleged that Petitioner Ruhrgas, A.G. ("Ruhrgas") defrauded them into loaning hundreds of millions of dollars for

the development of the Heimdal gas field, which is located in the North Sea. These allegations were based on misrepresentations and fraudulent omissions contained in hundreds of letters sent by Ruhrgas to Marathon and MIOC in Houston, Texas over a multi-year period. Ruhrgas officials also traveled to Marathon's Houston, Texas headquarters for three in-person meetings concerning the gas field matter.

Norge is a Norwegian corporation and an affiliate of Marathon and MIOC. It owns the production license for the Heimdal field. Norge alleges that the value of its license has been diminished by Ruhrgas' refusal to permit the sale of Heimdal gas to *any* buyers except members of Ruhrgas' cartel, known as the "Consortium." Norge also alleges that Ruhrgas participated with its joint venture partner, Statoil (the Norwegian oil and gas company), in breaches of fiduciary duties Statoil owed to Norge. These matters, too, were the subject of the three in-person Houston meetings and numerous correspondence directed to Respondents in Texas.

Respondents' claims arise from, or directly relate to, deliberate contacts by Ruhrgas with the forum state—Texas. Furthermore, Ruhrgas has maintained employees in Houston for many years. None of Respondents' claims present a federal question; instead, they are garden-variety tort claims arising under Texas law.

B. Procedural History

After Respondents filed this lawsuit in Texas state court, Ruhrgas removed the case to federal district court for the Southern District of Texas on August 21, 1995. A week later it filed, among many other

motions, a motion to stay pending arbitration based on an arbitration clause contained in a contract between Ruhgras and Marathon Petroleum Company (Norway), a non-party affiliate of the Marathon Respondents. On September 15, 1995, Respondents filed a Motion to Remand, raising the absence of federal subject matter jurisdiction.

Respondents asked the district court to stay all activity in the case until it had considered its subject matter jurisdiction, urging that a simple facial examination of the pleadings revealed no basis for federal removal jurisdiction. J.A. 137. Ruhrgas then sought an order staying consideration of subject matter jurisdiction until it had conducted "discovery" in support of its notice of removal and in connection with its assertion that the court lacked personal jurisdiction. The court withheld a ruling on the remand question and permitted Ruhrgas to conduct the requested discovery. Thereafter, on November 17, 1995, the court, noting the absence of any arbitration agreement between the parties, denied Ruhrgas' motion to stay pending arbitration. The alleged existence of such an agreement had been Ruhrgas' principal argument in support of federal subject matter jurisdiction. Nevertheless, on March 29, 1996, the district court entered an order dismissing the case for lack of personal jurisdiction and denying as moot the motion to remand.

Respondents and Ruhrgas both appealed to the Fifth Circuit. On June 10, 1997, a Fifth Circuit panel found that Ruhrgas (a) had not met its burden of showing an agreement to arbitrate, (b) had not shown fraudulent joinder, and (c) had not shown that the suit raised a federal question by virtue of the federal common law of international relations. Thus,

there was no subject matter jurisdiction. The court remanded the case to the state court from which it was improvidently removed. This Court denied *certiorari* on November 10, 1997, but the Fifth Circuit voted to rehear the case *en banc*.

On *en banc* rehearing, the Fifth Circuit limited itself to the question whether a federal district court may dispose of a case on a Rule 12(b)(2) motion challenging personal jurisdiction without addressing whether it had subject matter jurisdiction under Article III and the governing statutes. Concluding that subject matter jurisdiction is a threshold issue, the court remanded to permit the district court to determine whether such jurisdiction existed. Claiming this ruling presented a conflict with the Second Circuit, Ruhrgas again sought *certiorari*. This Court granted the Petition on December 7, 1998.

SUMMARY OF ARGUMENT

This case exemplifies why federal subject matter jurisdiction must be determined as a threshold issue. This action was filed in a Texas state court, by two Texas residents and an alien, asserting claims based on Texas law arising from conduct occurring, in significant part, in Texas. Four years later, the case remains stuck in a federal procedural quagmire, and no federal court ever has found a basis for subject matter jurisdiction. To say, as Ruhrgas does, that such a result is compelled by judicial "efficiency" is outrageous.

Federal courts are courts of limited jurisdiction, deriving their judicial authority from Article III of the Constitution. This constitutional grant of authority involves two important principles: (1) The scope of federal subject matter jurisdiction is limited by

Article III itself; and (2) Authority to determine the jurisdiction of inferior federal courts within that scope is delegated to Congress. These two principles are deeply rooted in notions of federalism. The concerns they reflect become especially pronounced when a litigant attempts to remove a case from state to federal court. For a federal court sitting in a removed case to ignore a challenge to its authority over the subject matter simply because the court believes it might be "easier" or "more efficient" is irreconcilable with the fundamental allocation of judicial power within our federal system.

For every case originally filed in federal court, the first and fundamental question the court must address is whether it possesses constitutional and statutory subject matter jurisdiction over the case. And this threshold question is even more important in cases removed from state courts, for if it even "appears" that the answer is negative, the case "shall" be remanded promptly. The inquiry may not always be "easy," but difficulty of decision is no substitute for subject matter jurisdiction, and federal law provides an answer for difficult cases: all doubts must be resolved in favor of remand. To further minimize interference with the state courts, the federal removal statutes were drafted to render a remand order unappealable. Following remand, of course, the state court is fully capable of deciding all other issues in the case, including questions—whether easy or hard—about the reach of the state's long-arm statute.

Ruhrgas argues that the approach it advocates would promote efficiency in the administration of the federal courts. This argument is flawed in at least two respects. First, Ruhrgas' approach would in fact be *inefficient* for a number of reasons, especially given

the multi-factor analysis that would ensue whenever a federal court was asked to ignore its subject matter jurisdiction. Second, and more fundamentally, the approach contemplates that the most basic limitation on federal court authority, which goes to the core of the allocation of judicial power between the federal government and the states, may be ignored in the name of administrative efficiency.

ARGUMENT

I. THE SIGNIFICANCE OF ARTICLE III AND THE MADISONIAN COMPROMISE

The delicate balance of state and federal court authority that would be upset by Ruhrgas' proposals should be viewed in light of the compromise that first gave rise to "national" courts. While the framers of the Constitution had little difficulty authorizing a federal judiciary—albeit a judiciary of carefully limited subject matter jurisdiction—the Constitutional Convention hotly debated the desirability of establishing inferior federal courts. Indeed, before the Convention, there were only very limited national courts.[1] The controversy reflected the basic constitu-

[1] For instance, Article IX of the Articles of Confederation authorized a mechanism to resolve certain disputes between the states. That procedure was rarely invoked. *See* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6 n.31 (4th ed. 1996) [hereinafter "HART & WECHSLER"]; John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 8 & n.32, 33 (1948). Article IX also authorized the Congress to appoint courts to try piracies and felonies on the high seas. State courts invariably were appointed for this purpose. Appeals from these courts were heard by a national judicial body—at first a Congressional committee and then "The Court of Appeals in Cases of Capture." HART & WECHSLER at 6-7; Frank, 13 LAW & CONTEMP. PROBS. at 8 n.32.

tional tension about the allocation of powers between the states and the new federal government.

Proponents of increased national power ("Nationalists") led by James Madison and Edmund Randolph, proposed a clause establishing a "National Judiciary . . . to consist of one or more supreme tribunals, *and of inferior tribunals.*"[2] The first clause created little controversy, but there was a "strong sentiment" against the creation of inferior federal courts of original jurisdiction. Frank, 13 LAW & CONTEMP. PROBS. at 10. Many at the Convention wished to leave "all litigation at the trial stage to the state courts." *Id.* John Rutledge, speaking for a group of delegates adverse to expanded national power, flatly opposed the creation of any lower federal courts, saying: "State tribunals might and ought to be left in all cases to decide in the first instance, the right to appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments." 1 RECORDS OF THE FEDERAL CONVENTION at 124.[3]

Despite Madison's spirited defense of inferior federal courts, Rutledge's motion to eliminate them prevailed. Madison responded with a compromise that would authorize Congress to create inferior federal courts and, by necessary implication, to limit their subject matter jurisdiction within the confines of

[2] Madison's journal record from May 29, 1787 session, *in* 1 RECORDS OF THE FEDERAL CONVENTION at 21 (Max Farrand ed. 1937) (emphasis added).

[3] Roger Sherman of Connecticut apparently agreed. He added that inferior courts would prove to be too costly. HART & WECHSLER at 8; 1 RECORDS OF THE FEDERAL CONVENTION at 124-25.

Article III.[4] After more spirited debate,[5] the Madisonian Compromise, as it came to be known, eventually carried the day.

The authority delegated to Congress by the Madisonian Compromise was implemented by the Judiciary Act of 1789,[6] which established a system of inferior federal courts with specific jurisdiction. The Judiciary Act fell short of vesting federal jurisdiction to the full extent allowed by Article III.[7] Subsequent congressional actions have redefined federal jurisdiction, first expanding and then, for the last century,

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[4] 1 RECORDS OF THE FEDERAL CONVENTION at 125. And some delegates may have understood the language of the compromise to enlist *state* courts for "national purposes" rather than create new "national" courts. James F. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 717 (1998); *see also* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 120 ("The practice of appointing state courts as federal courts, common at the time of the Convention, may therefore have been understood by some delegates as the natural reference of the Compromise's language . . . .").

[5] Pierce Butler of South Carolina argued that the establishment of lower federal courts would cause the states to "revolt at such encroachments." 1 RECORDS OF THE FEDERAL CONVENTION at 125.

[6] Act of Sept. 24, 1789, 1 Stat. 73.

[7] Congress never has conferred the full jurisdictional power of Article III to the lower federal courts. *E.g., Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 371-74 (1978); *see also* HART & WECHSLER at 32. Most of the history of successive Judiciary Acts since the 1789-1802 period is a study in careful drafting of boundaries to, and the placement of limitations on, federal district court jurisdiction.

generally restricting the scope of federal trial court authority.[8] Throughout this history, however, Congress has carefully balanced states' rights against federal power by specifically defining and restricting the jurisdictional reach of federal courts. *E.g., Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 514-15 (1898); *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941). Fundamental to this balance is the principle that federal courts may not act without power over the case. Indeed, by 1883, this Court had recognized a "presumption" that lower federal courts were *without* subject matter jurisdiction over the case "unless the contrary affirmatively

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[8] To be sure, federal district court jurisdiction as delineated in the Judiciary Acts has seen periods of growth. Reconstruction Congresses enacted a series of statutes extending the jurisdiction of the federal courts, and as HART & WECHSLER state, "[m]ost sweepingly, the Judiciary Act of 1875 conferred on the federal judiciary a general jurisdiction over all cases 'arising under' federal law." *Id.* at 86. However, as federal judicial business exploded, "Congress finally responded to the crisis with the Judiciary Acts of 1887-88, which put a series of curbs on access to the lower federal courts," and thereby substantially fixed the framework of the contemporary federal system. *Id.* at 37.

Since the 1887-88 Acts, the general trend has been for Congress to be careful about lower federal court jurisdiction. For instance, in the Lochner era, Congress proceeded to rein in lower federal court jurisdiction as a result of federal courts engaging in "broader and potentially more intrusive scrutiny of state and federal legislation." *Id.* at 38. Since that time, apart from jurisdictional grants in newly-created federal causes of action, the most significant changes with respect to lower federal court jurisdiction appear to have been increases in the amount-in-controversy requirements for diversity cases and the elimination of such requirements in federal question cases. *Id.*

appears." *Grace v. American Century Ins. Co.*, 109 U.S. 278, 283-84 (1883).

Thus the Constitution left to Congress two basic determinations: whether to establish inferior federal courts, and the extent of their subject matter jurisdiction (within the limited authority conferred by Article III). This constitutional decision is especially significant to this case. It means that the threshold issue of federal judicial competence includes both the question whether the case falls within Article III itself and the question whether Congress has in fact authorized the exercise of federal judicial authority in the particular case. An affirmative answer to both questions is required in order to satisfy the limits imposed by the founders and to ensure that the interests of the states are properly protected. Judge Smith and a majority of the Judges serving on the Fifth Circuit correctly determined that without such an affirmative answer, a federal district court cannot proceed.

II. THE EXISTENCE OF FEDERAL SUBJECT MATTER JURISDICTION IS A PRELIMINARY AND NECESSARY THRESHOLD QUESTION

Mindful of these historical considerations, this Court consistently has observed that federal subject matter jurisdiction is a threshold consideration. *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012-13 (1998). Without such jurisdiction over a case, an inferior federal court "cannot proceed at all." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869). Rather, "the only function" properly available to a court without federal subject matter jurisdiction "is announcing that fact and dismissing [or in a removed case, remanding] the cause." *Id.*

This restriction springs directly "from the nature and limits of the judicial power of the United States" embodied in the Madisonian Compromise. *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

Indeed, this Court has long recognized that if a federal district court assumes the power to act in a case where Congress has not authorized inferior court action, it violates Article III, the Compromise that led to it, and more generally, the "power reserved to the states under the Constitution." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). This concept of subject matter jurisdiction is not at all "protean" and is fundamentally different from other matters that have been denominated "jurisdictional," such as personal jurisdiction (including amenability to service of process) or improper venue.[9] Federal courts, as opposed to state courts, may reach the issues in a case only if there is *both* constitutional and statutory authority for subject matter jurisdiction.

> Because of their unusual nature, and because *it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their jurisdiction*, the rule is well settled that the party seeking to in-

[9] *See* HART & WECHSLER at 1583-85. Ruhrgas, at pp. 21-24 of its brief, invokes decisions of this Court dealing with questions of abstention and supplemental jurisdiction to support its argument that the federal courts have discretion to bypass questions of subject matter jurisdiction when convenience dictates. But those cases could not be more inapposite. They all involve instances in which subject matter jurisdiction *exists*, and the question is whether, as a matter of carefully confined discretion, considerations of federalism warrant a discretionary decision *not* to exercise that jurisdiction, at least before a state court has had an opportunity to act.

voke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court.[10]

This rule is not new—it is precisely the compromise Madison envisioned. As this Court recently observed in *Steel Co.*: "This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. . . . The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" [11] Whether a statutory grant of subject matter jurisdiction can or should be considered before addressing the ultimate reach of Article III might be debatable; however, *Steel Co.* confirms that subject matter jurisdiction under Article III must be present *at the threshold.*[12] *E.g., Steel Co.*, 112 S. Ct. at 1022 (Stevens, J., concurring). The point, as reflected in the Madisonian Compromise, Article III and the Tenth Amendment, is that *both* Article III *and* congressional authorization to act must be present before an inferior court may assume power over

[10] *Marathon Oil Co. v. Ruhrgas, A.G.*, 145 F.3d 211, 216 (5th Cir. 1998) (en banc) (quoting 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3522, at 61-62 (2d ed. 1984)) (emphasis added by the court).

[11] *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012 (1998) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Ruhrgas' citation of *Steel Co.*, Pet. Brief at 15, as referring to both subject matter jurisdiction and personal jurisdiction is incorrect since the case (and the quotation) plainly refer *only* to subject matter jurisdiction.

[12] *E.g., City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941); *Shamrock Oil & Gas Corp.*, 313 U.S. at 108-09; *Healy*, 292 U.S. at 270.

the case and reach any issue other than subject matter jurisdiction.

The rule to which this Court has adhered for more than 100 years remains in effect today.[13] In every federal case, the "first question" necessarily is that of subject matter jurisdiction, for if Congress has not granted such jurisdiction to the inferior courts, "it is useless, if not improper, to enter into any discussion of other questions." *Ex parte McCardle*, 74 U.S. at 515. So primary is this single issue that even on writ of error or appeal, "the first and fundamental question is that of jurisdiction." *Mansfield*, 111 U.S. at 382.[14]

[13] Ruhrgas' reliance (pp. 18, 19, 28, 38) on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), is wholly misplaced. In that case, this Court held that even if subject matter jurisdiction was lacking when the district court erroneously denied a motion to dismiss, a decision on the merits should be upheld so long as subject matter jurisdiction *did* exist at the time judgment was rendered. This holding has no bearing on the question whether a federal court may properly ignore a continuing lack of subject matter jurisdiction in order to reach and decide other issues in the case.

Similarly irrelevant in the present case are this Court's decisions, discussed at pp. 13-15 of Ruhrgas' brief, holding that a federal court has "jurisdiction to determine jurisdiction" and may take whatever action is appropriate (including the issuance of discovery orders and contempt sanctions) with respect to the making of that determination. Of course, a court must have such authority; it does not follow, however, that a federal court also has authority to take actions *unrelated* to the proper determination of subject matter jurisdiction or *unnecessary* to preserve the status quo while it undertakes that task.

[14] The "purity" of Article III jurisdiction remains unalloyed when the balance of state and federal authority is at stake. None of the "dilution" cases cited in *Steel Co.* challenged state court original jurisdiction.

III. THE NEED TO DETERMINE SUBJECT MATTER JURISDICTION AT THE THRESHOLD IS ESPECIALLY EVIDENT IN REMOVED CASES

The necessity of determining federal subject matter jurisdiction at the outset exists in every case. In the removal context, however, the underlying principles of federalism become especially important. Pursuant to 28 U.S.C. § 1446, a defendant may remove a case from a state court simply by filing a Notice of Removal in the appropriate federal district court. Once the defendant files a copy of the notice with the clerk of the affected state court, federal law commands "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). The simplicity of this procedure, however, offers a potential for abuse well beyond the imagination of anyone at the Constitutional Convention.[15] Accordingly, Congress and the federal courts have placed strict limits on removal to maintain federalism's delicate balance.

A. Statutory Limits On Removal Protect The Plaintiff's Choice Of Forum And Reflect The Threshold Nature Of Subject Matter Jurisdiction

Congress first authorized removal in the Judiciary Act of 1789 and, since that time, has restricted removal jurisdiction and placed firm guidelines on the procedure to curb abuse. To prevent improvident

[15] *See generally* Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 203 (1969) (decrying "outrageous practice" of stopping a state court "in its tracks by a frivolous petition for removal").

removal it has established several safeguards. The first is the primacy of federal subject matter jurisdiction: "If at any time before final judgment it *appears* that the district court lacks *subject matter jurisdiction*, the case *shall be* remanded." 28 U.S.C. § 1447(c) (emphasis added).[16] Such language in a jurisdictional statute "creates an obligation impervious to judicial discretion." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962 (1998) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). Indeed, this Court has observed that " 'the literal words of § 1447(c) . . . give no discretion to dismiss rather than remand an action.' The statute declares that, where subject matter jurisdiction is lacking, the removed case '*shall* be remanded.' " *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991). The body of precedent from this Court commanding all federal courts to scrutinize assiduously subject matter jurisdiction at each stage of litigation —trial and appellate—and to dismiss cases not prop-

[16] This concept is mirrored in Fed. R. Civ. P. 12(h)(3), which provides: "Whenever its appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action." Not surprisingly, lack of subject matter jurisdiction is the first defense listed in Rule 12(b). And as noted in one leading treatise: "[W]hen a [Rule 12(b)] motion is based on more than one ground, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1350, at 209-10 (2d ed 1990).

erly before them is overwhelming.[17] Likewise, the courts of appeals have embraced this concept as an imperative, holding that the appropriate course (even on appeal) is to examine for subject matter jurisdiction constantly and, if it is found lacking, to order remand to the state court.[18]

The second congressional safeguard stresses the finality of a remand for lack of subject matter jurisdiction, underscoring the notion that because state courts are the repositories of general jurisdiction, a remand cannot harm the defendant: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d).[19] This bright line rule applies "no matter how plain the legal error." *Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977).[20] As this Court has pointed out, the rule was intended to avoid "prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946).

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[17] *See, e.g., Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Bender v Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

[18] *See, e.g., Ziegler v. Champion Mort. Co.*, 913 F.2d 228 (5th Cir. 1990); *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742 (3d Cir. 1995).

[19] In most cases involving a remand, state courts will have concurrent jurisdiction. In the very rare instance of a remand of a case in which federal subject matter jurisdiction is exclusive, an objection to state court authority over the subject matter may be made on remand and, if denied, may then be made the subject of a certiorari petition in this Court. Of course in the present case, there is no doubt of the state court's jurisdiction over the subject matter.

As a final check, Congress has strictly drafted the removal statute to limit a defendant's right to remove. Although federal question cases are generally removable, diversity cases may be removed only if none of the defendants resides in the state in which the suit was filed originally. *See* 28 U.S.C. § 1441(b). A defendant may remove a case only within 30 days from the time it becomes removable, or the opportunity to remove is lost. *See* 28 U.S.C. § 1446(b). Congress also authorized the entry of fee awards against a removing defendant where removal is later determined to have been improvident—even if the removal was made in good faith. *See, e.g.*, 28 U.S.C. § 1447(c); *News Texan, Inc. v. City of Garland*, 814 F.2d 216, 220 (5th Cir. 1987). As the Eleventh Circuit has observed, such restrictions confirm that the plaintiff's choice of forum and the defendant's right to remove are not "on equal footing." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

B. Judicial Limits On Removal Require Strict Statutory Construction And Resolution Of All Doubts In Favor Of Remand

As noted above, Congress has not been alone in checking abuse of the removal mechanism. Under this Court's guidance, the federal judiciary has been

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[20] A defendant may appeal a remand based on something other than a lack of subject matter jurisdiction. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344-45 (1976). This, again, demonstrates that the subject matter jurisdiction inquiry is qualitatively different.

careful to ensure that the limitations on federal judicial authority embodied in Article III and the Madisonian Compromise are respected and that the lower federal courts confine themselves to cases in which Congress has authorized them to proceed, leaving all other cases to the state courts. *E.g.*, *Healy*, 292 U.S. at 269-71. The courts have been especially cautious in the removal context. As this Court stressed in its unanimous *Shamrock Oil* decision, "the power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution." 313 U.S. at 108-09. This policy, noted the Court, requires *strict construction* of the removal statutes. *Id.*

The courts of appeals have consistently read the removal statutes strictly so as to require lower federal courts "scrupulously to confine their own jurisdiction to precise statutory limits." [21] In cases where the plaintiff and defendant clash over subject matter jurisdiction, the courts of appeals require that all doubts be resolved in favor of remand.[22] Accordingly,

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[21] *Ahern v. Charter Township*, 100 F.3d 451, 454 (6th Cir. 1996); *see also, e.g., American Home Assurance Co. v. Insular Underwriters Corp.*, 494 F.2d 317, 319 (1st Cir. 1974); *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990); *Brown v. Francis*, 75 F.3d 860, 864-65 (3d Cir. 1996); *In re Lowe*, 102 F.3d 731, 734-35 (4th Cir. 1996); *Cook v. Weber*, 698 F.2d 907, 909 (7th Cir. 1983); *International Assoc. of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995); *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996); *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

[22] *See, e.g., Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998); *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619 (8th Cir. 1997); *Brown v. Francis*, 75 F.3d 860 (3d Cir. 1996); *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689 (5th Cir. 1995); *Boyer v Snap-on Tools Corp.*, 913 F.2d 108 (3rd Cir. 1990).

where the subject matter jurisdiction question is "difficult," the federal judiciary already has devised a simple but effective means of resolving the issue: remand.

IV. IGNORING SUBJECT MATTER JURISDICTION IS NEITHER CONSTITUTIONAL NOR EFFICIENT

Despite the established rule that doubts as to subject matter jurisdiction be resolved in favor of remand, Ruhrgas offers this Court a new solution: permit the federal district court to ignore "difficult" issues of subject matter jurisdiction if ruling on an "easier" personal jurisdiction question would dispose of the case. Ruhrgas argues that this approach is justified in the name of judicial efficiency because it gives federal courts more discretion to dispose of a case, and it spares state courts from having to rule on personal jurisdiction issues.[23] Like "futility jurisdiction" [24] and "hypothetical jurisdiction," [25] however, there is simply no constitutional, statutory or policy support for Ruhrgas' new concept of "efficiency jurisdiction." *Cf.* 28 U.S.C. § 1447(c).

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[23] Under Ruhrgas' view, even "easy" questions apparently are a "burden" for state court judges.

[24] *See International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 88-89 (1991) (remanding case to state court for lack of subject matter jurisdiction pursuant to mandatory language of § 1447(c) despite argument that remand would be futile).

[25] *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012-13 (1998) (holding subject matter jurisdiction could not be assumed through "hypothetical jurisdiction" in order to reach a dispositive merits question).

A. Subject Matter Jurisdiction Is Fundamentally Different From All Other Categories Of Jurisdiction

Ruhrgas argues at some length that because its amenability to service of process is a personal jurisdiction question, a federal district court should be free to choose which "jurisdictional" issue to entertain first. But the banner of "jurisdiction" can be flown over a variety of issues and defenses that might eventually arise in a case.[26] Only a court with subject matter jurisdiction *over the case*, however, has the power to decide any of them. "Neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).

The idea of "efficiency jurisdiction" ignores the critical distinction between subject matter and personal (or any other) jurisdiction. As this Court explained in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*:

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[26] *E.g.*, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (treating sovereign immunity as "jurisdictional"); *Summit Hea'th, Ltd. v. Pinhas*, 500 U.S. 322, 330-31 (1991) (holding conduct reached by antitrust laws was a "jurisdictional" issue); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (addressing and ultimately rejecting argument that filing period under statute was "jurisdictional"); *Bank One v. United States*, 157 F.3d 397, 402-03 (5th Cir. 1998) (treating limitations under Quiet Title Act as "jurisdictional"). Justice Breyer's opinion for the Court in *Wisconsin Department of Corrections v. Schacht*, 66 U.S.L.W. 4531 (U.S. June 22, 1998) demonstrates that jurisdictional defenses, such as personal jurisdiction or, as in that case, the Eleventh Amendment, are considered after jurisdiction over the case.

> *Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power*, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[*T*]*he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception*, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record."
>
> *None of this is true with respect to personal jurisdiction.*

456 U.S. 694, 702 (1982) (emphasis added and citations omitted).

Unlike subject matter jurisdiction,[27] personal jurisdiction can be conferred by agreement,[28] can readily

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[27] *E.g.*, *Steel Co*, 118 S. Ct. at 1012-13; *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 & 1228-29 (9th Cir. 1989) (stressing that federal subject matter jurisdiction is presumed to be lacking and also stressing that, unlike personal jurisdiction, subject matter jurisdiction requirement cannot be conferred by contract or waived).

[28] *Stock West*, 873 F.2d at 1228-29.

be waived by the defendant [29] and can be pretermitted by the court until trial when it overlaps with a decision on the merits.[30] Such a defense has no better claim to being considered in advance of the question of who has the power over the case than any of the other issues that might be said to have "jurisdictional" significance.[31]

B. Deciding Other Issues Without Subject Matter Jurisdiction Deprives State Courts Of Their Residual Jurisdiction

When a federal court acting without subject matter jurisdiction dismisses a case for lack of personal jurisdiction, it impermissibly wrests that decision from the state courts.[32] Pursuant to their residual

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[29] *E.g., Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998); FED. R. CIV. P. 12(h)(1).

[30] *E.g., Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

[31] The Second and Fifth Circuits have required federal district courts to address a challenge to its jurisdiction over the case before reaching a personal jurisdiction defense. *See, e.g., Rhulen Agency, Inc. v Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990); *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 215 (5th Cir. 1998) (en banc); *see also Nichols v. Southeast Health Plan*, 859 F. Supp. 553, 559 (S.D. Ala. 1993) ("A federal court lacking subject matter jurisdiction cannot rule on other pending motions.") (citing *In re Bear River Drainage Dist.*, 267 F.2d 849 (10th Cir. 1959)).

[32] Although a dismissal for lack of personal jurisdiction is not a decision having "claim preclusive" effect, such a decision will have "issue preclusive" effect, *i.e.*, it will preclude relitigation of the issue of personal jurisdiction in a subsequent action on the same claim governed by the same law. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. b and illus. 3 (1982).

(and general) jurisdiction, state courts are entitled to interpret *both* their own long-arm statute *and* (subject to this Court's review) the minimum contacts requirement of the federal Due Process Clause.[33] *See Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 216 (5th Cir. 1998) (en banc). As Justice Harlan put it: "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States. . . ." *Robb v. Connolly*, 111

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[33] State courts invariably have a special interest in interpreting and applying their own long-arm statutes. Indeed, the long-arm statutes in some states do not reach even to the limits of the Due Process Clause. *See, e.g., American Investors Life Ins. Co. v. Webb Life Ins. Agency*, 876 F. Supp. 1278, 1280 (S.D. Fla. 1995). And the availability of long-arm statutes in other states is restricted to certain individuals *See, e.g., American Int'l Pictures, Inc. v. Morgan*, 371 F. Supp. 528, 531 (D. Miss. 1974) (recognizing that Mississippi's long-arm statute is available only to state residents). These differences reflect more than technical nuances; they exemplify the kinds of policy decisions that should be left to state courts. *Cf. Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440-41 (1952). As this Court recognized in *Colorado v. Symes*, "it is axiomatic that the right of the states, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it." 286 U.S. 510, 518 (1932).

Moreover, only at its limits does a state's long-arm statute implicate federal due process questions. Of course, any state procedure, at its limits, can present such a question. Nonetheless, these still are all fundamentally questions of state law. *Cf. Burnham v. Superior Court*, 495 U.S. 604 (1990) (plurality).

U.S. 624, 637 (1884); *see also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Ruhrgas now asks the Court to sacrifice the states' right to decide disputes within their power on the altar of efficient judicial administration.

C. "Efficiency Jurisdiction" Would Be Inefficient And Invite Abuse

The discretionary approach Ruhrgas advocates supposedly is "efficient" because (1) it frees a federal district court from having to address a "difficult" subject matter jurisdiction issue, and (2) it frees a state court from having to address an "easy" personal jurisdiction issue. But degree of difficulty cannot create the authority to decide an issue, even in the name of efficiency. *See Steel Co.*, 118 S. Ct. at 1012-13. And, as a practical matter, "difficult" questions of subject matter jurisdiction are so rare as to render the argument virtually moot.

> The fact is that while this issue [of federal question jurisdiction] raises fascinating intellectual problems, and provides marvelous examination questions for law professors to use, in practice it is of almost no significance. I doubt if I see as many as one reported decision a year in which there is any serious question whether the case is or is not within federal question jurisdiction. In the real world almost all cases fall within stereotyped patterns for which the answer is perfectly clear.[34]

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[34] Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 201 (1969). "Federal courts should not displace state responsibility and choke the federal judicial docket on the basis of federal concerns that in truth are only 'imaginary.'" *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 685-86 (1982) (Powell, J., dissenting, joined by Berger, C.J., Rehnquist and O'Connor, J.J.).

Nevertheless, Ruhrgas urges a multi-factor "efficiency" test that would add extraordinary uncertainty to the process and lend itself to continuing controversy.[35] According to Ruhrgas, the factors that *appear* to be relevant to this approach include (but are not necessarily limited to) the following: (1) Is the question of subject matter jurisdiction "harder" than the question of personal jurisdiction? (2) Is the question of subject matter jurisdiction one involving a limitation of federal authority under Article III itself, or one arising under a statute? (3) Is the question of personal jurisdiction one of federal law under the due process clause or of state long-arm law? (4) Is the claim of subject matter jurisdiction made in good faith? (5) Which issue, if either, would, or might, require the court to look into the merits of the case? Given the need to examine these and other questions under Ruhrgas' approach, the costs of a "discretionary," multi-factor approach clearly exceed the benefits.[36]

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[35] Ruhrgas' efficiency arguments fail to account for any of the practical considerations of the rule's application. The test advocated by the Fifth Circuit dissent in this case incorporates a series of factors that would authorize an inferior court to ignore the question of subject matter jurisdiction. It did not suggest that these factors would be exclusive or offer any predictable means of determining the weight given to each of the factors. It could take years, if not decades, to bring any predictability to a new legal standard of jurisdictional "efficiency."

[36] *Cf.* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 312 (1950) ("The boundary between judicial power and nullity should also, if possible, be a bright line, so that very little

Finally, any imagined efficiency resulting from Ruhrgas' new theory would evaporate the moment a federal district court makes the wrong decision. This case provides the perfect illustration:

> Respondents filed a state court petition stating claims arising only under Texas tort law. The face of their pleading raised no federal questions, and diversity jurisdiction was lacking.[37] The claims were based, in part, on actions Ruhrgas made while physically present in Texas during meetings with Marathon specifically related to the subject matter of the litigation. The claims also were based on more than 100 letters and telexes sent by Ruhrgas to Marathon and MIOC in Texas, and described a fraud-based conspiracy that specifically targeted Respondents in Texas. Had the parties remained in state court, there would have been no briefing on federal subject matter jurisdiction at all, and any personal jurisdiction challenges could have been decided by the state court.

Instead of pursuing this undeniably efficient path, Ruhrgas chose to remove the case to federal court, necessarily making the process more complex and less efficient. Making arguments it now admits were "novel," Ruhrgas asserted federal question jurisdiction on the basis of an international convention that

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thought is required to enable judges to keep inside it."). To the same effect, see Wright, *supra* note 34, at 187.

[37] Clearly, Ruhrgas would have preferred that this case had been filed by Respondents' affiliate as a breach of contract action. The plaintiff, however, is the master of the claims, and if it chooses not to assert a federal claim, even if one is available, the defendant cannot remove on the basis of a federal question. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 229 (5th ed. 1994).

did not apply according to its own terms,[38] and the supposed federal common law of international relations.[39] Ruhrgas also claimed that Norge had been fraudulently joined *as a plaintiff*,[40] even though Norge unquestionably owns the production license for the Heimdal field and is claiming Ruhrgas' actions damaged the value of that interest. All of these novel

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[38] The Convention on the Enforcement of Foreign Arbitral Awards only applies in cases where there is a written arbitration agreement between the parties. *See* 3 U.S.T. 2517; *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334-35 (5th Cir. 1987); *see also* 9 U.S.C. § 202 (requiring dispute to be between parties with an arbitration agreement that is within the reach of the Federal Arbitration Act). Affidavits attached to the removal papers proclaimed "Ruhrgas AG has never entered into any agreement with any of the plaintiffs concerning . . . any matters which are the subject of the First Amended Petition." J.A. 121.

[39] This Court never has recognized such a basis for federal subject matter jurisdiction. If any such basis exists, however, a private commercial dispute between corporations residing in different countries is patently insufficient to invoke it. *See Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 809 (5th Cir. 1992).

[40] Removing a non-diverse case from state to federal court on an assertion of fraudulent joinder of a *plaintiff* has never been authorized by Congress nor sanctioned by this Court. *Cf. Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914). Where a plaintiff—or a group of plaintiffs—has exercised its right to assert a claim against a defendant, the proper method of challenging that assertion is by seeking a dismissal in state court. *Cf.* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723, at 658 (3d ed. 1998) (concluding that the "confusion" surrounding fraudulent misjoinder of parties "easily could be avoided by having the removing party challenge the misjoinder in state court before seeking removal").

issues were briefed extensively by the parties. The district court's refusal to rule on these "difficult" issues created by Ruhrgas can hardly be described as efficient. Had the court simply resolved all doubts in favor of remand (as required by federal law) and returned the case to state court, the result would have been unappealable.[41]

Instead, the district judge ignored the subject matter jurisdiction challenge and erroneously dismissed the case for lack of personal jurisdiction. In so doing, the court created an appealable decision, injecting even more inefficiency into the process. Although the original Fifth Circuit panel found there was no subject matter jurisdiction and ordered a remand, Ruhrgas dragged the controversy out even further by petitioning this Court for *certiorari*. Upon denial of that petition, the Fifth Circut (on its own motion) elected to hear the case again, and ultimately remanded to the district court for a determination of subject matter jurisdiction. Displeased with that result, Ruhrgas continued to prolong the controversy by seeking further review.

In the four years of controversy since this case was removed, this entire state law dispute could have been disposed of in the state system. Instead, the federal courts have yet to establish their jurisdiction over the case, and merits discovery has not even begun. Clearly, Ruhrgas' proposed "efficiency jurisdiction" has proven anything *but* efficient.

Furthermore, as Ruhrgas' tortured subject matter jurisdiction arguments make clear, the recognition of discretionary "efficiency jurisdiction" merely invites

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[41] *See United States v. Rice*, 327 U.S. 742, 751 (1946); 28 U.S.C. § 1447(d).

abuse. If Ruhrgas' position is upheld, defendants nationwide will use the result as a basis for removing an action to federal court whenever there is even a possibility of subject matter jurisdiction, and then will press for a personal jurisdiction (or other "jurisdictional") ruling because the subject matter jurisdiction issue is "too hard." Such a result would replace the limited subject matter jurisdiction of the federal courts with a new era of forum shopping, and would thus undermine the allocation of authority between federal and state courts.

CONCLUSION

Questions of federal subject matter jurisdiction are questions of constitutional law, and "efficiency" should play little, if any, role in their resolution.

> In 1864, former Justice Benjamin Curtis made the still-timely reminder: "Let it be remembered, also, for just now we may be in danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several States." There is a recurring temptation to view questions of federal jurisdiction as if they were simple procedural questions, to be resolved in whatever fashion will best serve the desirable goal of efficient judicial administration. But when it is remembered that the delicate balance of a federal system is at stake, and that expansion of the jurisdiction of the federal courts diminishes the power of the states, it is apparent that efficiency cannot be the sole or the controlling consideration.
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> CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS, at 2 (5th ed. 1994).

It is self-evident that a federal court first must have jurisdiction *over the case* before it can proceed to rule

on other issues *in* the case. Ruhrgas' request that this Court recognize "efficiency jurisdiction" is an affront to federalism, a model of inefficiency, and an invitation for abuse. This Court should decline to recognize it, confirm the threshold nature of federal subject matter jurisdiction in federal courts, and affirm the Fifth Circuit's decision below.[42]

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[42] In a remarkable footnote at the end of its brief (p. 38 n.20), the Petitioner suggests that the judgment below should be reversed and the judgment of the district court affirmed. Respondents submit that the judgment below should be affirmed, but in no event would it be appropriate to order that the judgment of the *district court* be affirmed. The question of personal jurisdiction, which was also before the court of appeals, has not been ruled on, either by the initial panel or by a majority of that court sitting *en banc*, and is not within the question presented to this Court.